

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

DANIEL S. DiGENOVA

Case No. 01-17881

Debtor

DANIEL S. DiGENOVA

Plaintiff

-against-

Adversary No. 02-90120

WASHINGTON MUTUAL BANK

Defendant

APPEARANCES:

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Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

The current matter before the court is Daniel S. DiGenova's ("Debtor" or "Plaintiff") motion for summary judgment. Plaintiff's underlying adversary seeks modification of the secured claim of Washington Mutual Bank ("Creditor" or "Defendant"). The court has jurisdiction via 28 U.S.C. §§ 157(a), 157(b)(1), 157(b)(2)(B) and 1334(b).

FACTS

Based on the pleadings, the court finds the following:

1. As security for the \$115,350 note, signed March 30, 1994, the Debtor provided a mortgage to the Creditor on 514 - 516 Westinghouse Place, Schenectady, New York.
2. The Creditor was aware that it was financing a multiple unit dwelling.
3. The property in question has a value of \$90,000.¹
4. The Creditor is undersecured.
5. The Debtor filed a Chapter 13 petition on December 17, 2001.
6. The underlying adversary complaint was filed May 2, 2002.
7. The Creditor filed a proof of claim in the amount of \$157,580.72 on February 28, 2002.

DISCUSSION

This court has recently addressed the issue presented in this case: does 11 U.S.C. § 1322(b)(2) prohibit the modification of claims secured by multi-family dwellings where the

¹In its answer to the underlying complaint, the Creditor denied the Debtor's \$90,000.00 allegation regarding value. However, in its response to the current summary judgment motion, the Creditor concedes the Debtor's valuation is correct "after due diligence." (Defendant's Response to Motion for Summary Judgment ¶ 2.)

Debtor lives in one of the units? In *In re Ferrera*, Case No. 01-10575² (October 11, 2002), this court adopted the reasoning of the First Circuit Court of Appeals in *Lomas Mortgage v. Louis*, 82 F.3d 1 (1st Cir. 1996). In *Lomas*, the First Circuit established a bright line test by deciding that multi-use dwellings are not subject to antimodification protection. *Id.* at 7.

The current case fits within the *Ferrera/Lomas* framework. The Creditor's claim is subject to modification.³ The court has found that the value of the real property is \$90,000. Therefore, the Creditor's claim is secured to that amount with any balance being unsecured.⁴

It is so ORDERED.

Dated: October 18, 2002

Hon. Robert E. Littlefield, Jr.
U.S. Bankruptcy Judge

² The court assumes familiarity with the *Fererra* decision.

³ In the motion for summary judgment, the Debtor alleges that the Creditor received from the Debtor an assignment of rents regarding the real property at issue. The Creditor does not deny that, thus, the court assumes it is true. As in *Fererra*, because of the court's disposition of the matter, it need not review the question of whether such an assignment also entitles the Debtor to seek modification pursuant to 11 U.S.C. § 1322(b)(2).

⁴ See Fact 8. The court assumes that counsel will be able to perform the calculations necessary to compute the unsecured portion of this claim.